IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 282 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE
and
Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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Versus

COMMISSIONER OF INCOME TAX

Appearance:

1. INCOME TAX REFERENCE No. 282 of 1987
NOTICE SERVED for Petitioner No. 1
MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE A.R.DAVE
and
MR.JUSTICE D.A.MEHTA

Date of decision: 14/08/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE D.A.MEHTA)

1. The applicant-assessee sought reference comprising six questions under Sections 256 (1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") and the Income Tax Appellate Tribunal, Ahmedabad Bench `B' has raised and referred the following two questions for the opinion of this Court.

"(i) Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that expenditure of Rs.2,05,509/- incurred on office building was in the nature of capital expenditure and hence the same was not deductible as revenue expenditure?"

(ii) Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that expenditure of Rs.29,392/- incurred on borewell was in the nature of capital expenditure and hence the same was not deductible as revenue expenditure ?"

2. The assessment year is 1982-83 and the relevant accounting period is calendar year 1981. The assessee-company is a Private Limited Company, carrying on business of Ginning of cotton waste and pressing of cotton bales as well as business in straw boards and rental income from godown. During the year under consideration the assessee-company claimed Rs.2,05,509/towards building repairs relatable to godown and office building situated at its premise located at Amdupura Naroda road Ahmedabad. A further sum of Rs.29,592/- incurred on bore expenses relatable to its Ramol factory premise was incurred, and both these expenses were claimed to be revenue in nature and hence deductible under Section 37 of the Act.

3. The Income Tax officer for the reasons stated in the assessment order held that both the expenses were capital in nature and the assessee has acquired benefit of enduring nature. The assessee's appeal before the C.I.T. (Appeals) succeeded and it was held by the Appellate Authority that as a result of the repairs carried out by the assessee it had not derived any advantage of enduring nature. The revenue challenged the appellate order before the Tribunal, and the Tribunal allowed the revenue's appeal in relation to the

assessee's claim regarding the expenditure incurred on repairs of building and tubewell.

4. In relation to the expenditure incurred on renovation of the hall, the Tribunal held that not only the old asset has been completely changed but that its use had also been changed, that is to say, the old godown had lost complete identity and a totally new asset in its place had come into existence because improvements made were quite substantial. The Tribunal therefore upheld the view of the Income Tax Officer that the expenditure incurred was capital in nature and hence could not be allowed as a business expenditure. Similarly, in relation to expenditure on borewell the Tribunal held that the expenditure was in the nature of capital expenditure and hence the claim of the assessee was rejected.

5. Mr.M.K. Patel, learned counsel appearing on behalf of the assessee-applicant, submitted that the assessee had merely converted the old hall, which was up to this point of time used as creche and water room, into a premise where the office of the assessee was shifted. It was therefore urged that no new building or room had been brought into existence; that the fixed capital of the assessee remained untouched; the assessee by incurring the aforesaid expenditure put the profit making apparatus to more efficient use and lastly it was submitted that the test of the enduring benefit was not infallible test as held by the Supreme Court. In support of his contentions he referred to and relied upon the decisions of the Apex Court and this Court in the following cases; (1) Ahmedabad Manufacturing and Calico Pvt. Ltd., v. Commissioner of Income Tax, 162 I.T.R. 800, (Guj.), (2) Commissioner of Income Tax, West Bengal II v. Kalyanji Mavji & Co., 122 I.T.R. 49 (S.C.), (3) Empire Jute Co. Ltd. v. Commissioner of Income Tax 124 I.T.R. 1 (S.C.)

6. In so far as the expenditure of borewell is concerned, it was pointed out that the borewell had originally been dug and constructed in 1973; that as the water supply had dwindled, the borewell was got repaired by changing certain pipes and the submersible pump and the expenditure in question was mostly related to labour charges.

7. Mr.Akil Kureshi, learned standing counsel appearing for the revenue, in reply submitted that the old asset was a hall which was not put to any business use. As such, it was further submitted, that taking into

consideration the area and the quantum of expenditure involved, it was apparent that not only the flooring had been changed, the iron sheets of roof had been changed, the wooden pillars had been removed, but in place thereof all the walls had been plastered and painted, new cabins were put up within the hall and thus by incurring the expenditure in question, the identity of the premise had been changed both internally and externally. It was submitted that in light of the extensive changes carried out it was not possible to accept the contention that repairs were carried out, but a new asset had come into existence and alongwith the same the use of the asset had also changed significantly. It was further submitted that taking an overall view or a composite picture of the expenditure incurred and the nature of the so called repairs, the only conclusion that was possible was that the assessee had derived an enduring advantage, which would be in the capital field and in no circumstances can it be termed to be revenue expenditure. In support of his submissions reliance was placed on the following decisions ; (1) Commissioner of Income Tax, Bombay City-II v. Ballimal Nawal Kishor 119 I.T.R. 292, (Bombay), (2) Ballimal Nawal Kishor and another v. Commissioner of Income Tax 224 I.T.R. 414 (S.C.), (3) New Shorrock Spinning and Manufacturing Co. Ltd. v. Commissioner of Income Tax, 30 I.T.R. 338 (Bombay). In so far as the expenditure relatable to borewell, the submission on behalf of the revenue was that the Income Tax Officer and the Tribunal had correctly held the same to be expenditure of capital nature.

8. The Apex Court in case of Kalyanji Mavji & Co. (Supra) was called upon to decide a controversy whether the expenditure was of revenue nature or not where the assessee incurred expenditure for the purpose of renovating the buildings, reconditioning machinery and cleaning tubewells from the land and such expenditure was admittedly in relation to accumulated arrears for repairs, in view of the fact, that the colliery of the assessee was requisitioned for military use and occupied for a period of nearly 13 years. In this context it is stated that;

> "It has been held that accumulated arrears for repairs are none the less repairs necessary to earn profits, although having been allowed to accumulate".

9. The Court has further held that on accepted commercial practice and trading principles, an item of business expenditure must be deducted in order to arrive

at the true figure of profits and gains for tax purposes and thereafter, referred to various decisions of the privy council and earlier decisions of Supreme Court and held that "if the contents of that rule be true on general principle, there is good reason why the scope of Section 10 (2) (xv) should be construed liberally. In our opinion, even if the expenditure made by the assessee in the present case cannot be described as `current repairs', he is entitled to invoke the benefit of Section 10 (2) (xv)". The reference to Section 10 (2) (xv) in the aforesaid decision is to the provision under the Act of 1922, and the said provision is similarly worded to Section 37 of the 1961 Act. The Apex Court has thereafter held that as no new asset had come into existence and no new advantage had been obtained, the expenditure incurred by the assessee in that case was revenue expenditure.

10. In relation to the test of enduring benefit the settled legal position as can be culled out from various judgments is that: what is material is to consider the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable. If the advantage consists merely in facilitating the assesse's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. By `enduring' is meant "enduring in the way that fixed capital endures" and it does not connote a benefit that endures in the sense that for a good number of years, it relieves the assessee of revenue payment or disadvantage. The words "permanent" and "enduring" are only relative terms and not synonymous with perpetual or everlasting. In the case of Empire Jute Co., Ltd. (Supra) the Supreme Court held that "There may be cases where the expenditure, even if incurred for obtaining an advantage of enduring benefit may non the less, be on revenue account and the test of enduring benefit may break down".

11. Applying the aforesaid principles to the present case, the facts on record show that the assessee was having a business asset, namely godown, which was used as a creche for children of the female workers employed in its factory. The said business asset has now been put to different use, i.e. for purposes of the administrative office. In other words, the business asset has retained its character and only its use has changed. The use at

both the points in time, i.e. before and after the expenditure was incurred relates to the business of the assessee. The Tribunal in this context has observed in paragraph 14 that "We would like to observe that before the I.T.O., the accountant of the respondent had admitted that the old godown was not used for any business activity." However, the Tribunal has unfortunately not appreciated the statement of the accountant in its entirety as can be seen from paragraph of the assessment order wherein the remaining sentence recorded by the Income Tax Officer reads as ; " But it was only used as a resting place for the karigars and workers whose small children of female workers were also allowed to take rest in the cradles". We can only say that the Tribunal being the final fact finding authority should record facts in the entirety and not in truncated manner as was done in the present case.

12. Mr.Kureshi's reliance on two decisions of the Bombay High Court and the decision of the Supreme Court referred to herein before cannot carry the case of the revenue any further. As can be seen from the decision of Bombay High Court in case of New Shorrock Spinning Mills (Supra), the Court was called upon to decide whether the expenditure incurred in that case was allowable deduction under Section 10 (2) (v) of the Indian Income Tax Act, 1922. The entire judgment has proceeded in relation as to the meaning of "current repairs" and in which of the circumstances, an expenditure can be said to be falling within the scope of the said provision. The Court has been very categorical in stating that "We are not going to decide the question as to whether this case falls under Section 10 (2) (xv) or not". Even otherwise, on merits it can be seen that particular parts of the machinery which were used for a period of nearly 60 years were replaced for the first time after 60 years, and even in that context, the Court has opined that this was the expenditure which the assessee could claim as permissible deduction under Section 10 (2) (v) of the 1922 Act. The ratio laid down in this decision has been applied by Bombay High Court in the case of Ballimal Naval Kishor (Supra) and the said decision has been confirmed by the Supreme Court in 224 I.T.R. 414. Thus, as can be seen from both the decisions, the entire controversy rested on whether the expenditure incurred for renovation of the theater premise was allowable as deduction being in the nature of "current repairs" or not. The Court was nowhere called upon to decide the controversy by invoking the provision of Section 37 i.e., 10 (2) (v) of the old Act. In our opinion therefore, it is not possible to apply the test formulated for determining whether the

expenditure is incurred for "current repairs" to a situtation falling under Section 37 of the Act for the purposes of ascertaining whether the expenditure is in the nature of revenue expenditure or not.

13. Admittedly, in the present case, there is no addition to or expansion of the profit making apparatus of the assessee. The income earning capital i.e. fixed capital remains as it was prior to the incurring of the expenditure in question. Therefore, the Tribunal was not right in law when it held that the expenditure in question was capital in nature in as much as the assessee has made the existing premise suitable for office purpose i.e. to say put its business asset to moere profitable and efficient use.

14. In so far as Second question is concerned the facts are that the assessee company has incurred expenses for boring a new tube well in calender year 1973. After a period of 7 years an expenditure of Rs.29,592/- has been incurred towards cleaning of the existing tubewell and altering the pipes of the pump installed inside the well. The Tribunal has fallen into error in placing reliance upon the decision where the assessee attempted to install borewell at new factory site and failed in that attempt. The ratio of such decision cannot be pressed into service on the facts as they existed in the case at land. We therefore hold that the Tribunal had erred in holding that the expenditure incurred on borewell is in the nature of capital expenditure.

15. We therefore answer both the questions referred to us in the negative i.e. in favour of the assessee and against the revenue.

The reference stands disposed of accordingly with no order as to costs.

14.8.2001 (A.R. Dave, J.)

(D.A. Mehta, J.)

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